

LETTER OPINION
94-L-194

August 1, 1994

Ms. Shirley Dykshoorn, Director
Office of Intergovernmental Assistance
600 East Boulevard Avenue
Bismarck, ND 58505-0170

Dear Ms. Dykshoorn:

Thank you for your letter concerning the classification of economic development records under N.D.C.C. ch. 44-04. Specifically, you ask whether records which are exempt from the open records requirement of N.D.C.C. ? 44-04-18.2 but which are not classified confidential under N.D.C.C. ? 44-04-18.4 can be publicly disclosed.

To answer your question, the entire statutory scheme of disclosure of public records by governmental agencies must be reviewed. The Legislature has created three classifications of public documents. The first category consists of those documents which are classified by statute as confidential. The second category consists of documents which are subject to North Dakota's open records law found in Article XI, Section 6 of the North Dakota Constitution and N.D.C.C. ? 44-04-18, are not exempt by operation of law, and have not been statutorily classified as confidential. The third category consists of documents which are exempt from the open records law but are not classified as confidential.

The Legislature has specifically addressed the issue of disclosure of the first category. N.D.C.C. ? 12.1-13-01 provides that any person who "in knowing violation of a statutory duty imposed on him as a public servant" discloses any confidential information "which he has acquired as a public servant" is guilty of a class C felony. This statute further defines "confidential information" as "information made available to the government under a governmental

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assurance of confidence as provided by statute." Consequently, it is my opinion that the first category includes not only those documents which a statute specifically states are confidential, but also those which a statute provides cannot be disclosed or for which the Legislature has provided a penalty for disclosure.

The Legislature has also specifically addressed disclosure of the second category of documents. N.D.C.C. ? 44-04-18 requires that "all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, . . . are public records, [which are] open and accessible for inspection during reasonable office hours" unless a specific exemption is created by law. (Emphasis supplied.) A violation of N.D.C.C. ? 44-04-18 is punishable as an infraction.

The Legislature has not addressed disclosure of the third category of documents. For example, certain "economic development records and information are not public records subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota" yet there is no declaration of confidentiality or penalty provided for disclosure. Disclosure of the records is not prohibited by the mere statement that the records "are not public records subject to" the open records law. There is no declaration of confidentiality bringing the record under the scope of N.D.C.C. ? 12.1-13-01, nor is there a statutory penalty for disclosure elsewhere. It is therefore my opinion that, absent a statute's requiring the records to be open or a statute prohibiting disclosure, the administrator of the agency having custody of the records may exercise discretion in determining whether to disclose a record.

An administrator is responsible for determining whether any given record falls within the category of documents which the Legislature has classified as confidential. If the record has not been classified

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as confidential, the administrator must determine whether the document is a record subject to the open records law. If it is, the administrator must determine whether an exception to the open records law applies. If the document is specifically exempt from the open records law and no penalty exists for its disclosure, the decision on whether to disclose the document rests with the administrator.

The administrator's decision regarding whether disclosure of a document is appropriate should be based upon the particular situation, the type of record, the interests served by release or nondisclosure of the document and any other relevant factors. Disclosure of a document or information to one individual or one category of persons does not necessarily mean, however, that the document has become an open record which must be disclosed to all persons. For example, a determination could be made to disclose records only to those persons who were directly affected by them, or those individuals who were named within the records without opening the records to the general public. The administrator's best discretion should be used in each instance to determine whether a request for a record will be granted.

N.D.C.C. ? 44-04-18.2(1)(b) exempts economic development records consisting of "[t]rade secrets and commercial or financial information received from a person, business, or industry that is interested in or is applying for or receiving financing or technical assistance, or other forms of business assistance" from the public disclosure requirements of N.D.C.C. ? 44-04-18 and Article XI, Section 6 of the North Dakota Constitution. In similar fashion, N.D.C.C. ? 44-04-18.4 classifies trade secret, commercial, and financial information as confidential "if it is of a privileged nature and . . . has not been previously publicly disclosed." Thus, N.D.C.C. ? 44-04-18.2 broadly exempts all trade secret, commercial, or financial information from public disclosure, but N.D.C.C. ? 44-04-18.4 only classifies such information as confidential if it is privileged and has not been publicly disclosed.

From a practical point of view, it may be difficult to determine whether particular information is

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confidential trade secret, commercial, or financial information under N.D.C.C. ? 44-04-18.4, or whether it is merely exempt trade secret, commercial, or financial information under N.D.C.C. ? 44-04-18.2. The federal Freedom of Information Act concerning commercial or financial information and N.D.C.C. ? 44-04-18.4 are similar; therefore, resort to federal case law can be helpful. 5 U.S.C. ? 552(b)(4) restricts public disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Accordingly, federal case law analysis under 5 U.S.C. ? 552(b)(4) would be applicable to N.D.C.C. ? 44-04-18.4 governing the classification of confidential commercial or financial information. However, confidential trade secret information is specifically defined in N.D.C.C. ? 44-04-18.4(2) and needs no further interpretation.

The United States Court of Appeals for the Fifth Circuit in Miami Herald Pub. Co. v. United States Small Business Admin., 670 F.2d 610, 613-614 (5th Cir. 1982), articulated a two-prong test to be used in determining whether certain commercial or financial information is "privileged or confidential". If it is determined to be confidential, it is exempt from the disclosure requirements of the Freedom of Information Act in 5 U.S.C. ? 552(a). The court stated:

Commercial or financial information is confidential for purposes of the exemption if its disclosure will likely (a) impair the government's ability to obtain necessary information in the future or, (b) cause substantial harm to the competitive position of the person from whom the information was obtained.

In order to show a likelihood of substantial competitive harm, the agency must show (i) that the entity that will suffer harm is in actual competition, and (ii) that substantial competitive injury will result from disclosure. "No actual adverse effect on competition need be shown The court need only exercise its judgment in light of the nature of the material sought and the competitive circumstances in which the [person from whom the information was obtained] does business, relying at least in part on relevant and credible opinion testimony." (Citations omitted.)

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See also Tinker Co. v. United States Customs Serv., 531 F. Supp. 194 (D.C.D. 1981); Sharyland Water Supply Corp. v. Block, 755 F.2d 392 (5th Cir. 1985), cert. denied, 471 U.S. 1137 (1985).

The legislative history of 5 U.S.C. ? 552(b)(4) indicates that the exemption from the disclosure requirements of the Freedom of Information Act for privileged or confidential trade secrets and commercial and financial information "would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information . . . such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency." Act of May 9, 1966, Pub.L. No. 89-487, 1966 U.S.C.C.A.N. (60 Stat.) 2418, 2427.

Whether disclosure of a particular document is likely to impair an agency's ability to obtain necessary information in the future or whether disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained, represent questions of fact that the custodian of the information must resolve on a case-by-case basis. The submitter's views regarding its commercial interests constitute an appropriate factor to be weighed in the determination of whether the information should be classified confidential. National Parks and Conservation Ass'n v. Morton, 351 F. Supp. 404 (D.C.D. 1972). See also Exec. Order No. 12600, 52 Fed. Reg. 23781 (1987), reprinted in 5 U.S.C. ? 552 (1994). Finally, the custodial official must bear in mind that exemptions are to be narrowly construed to effectuate the basic policy in favor of disclosure of government-held information. Sharyland Water Supply Corp., 755 F.2d at 398.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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